IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11/03/2004

CORAM

THE HONOURABLE MRS. JUSTICE R.BANUMATHI

CRL.APPEAL No.22 of 1998

Nagasubramanian ... Appellant /
Complainant

-Vs-

1.M/s.Hope Knitting Home,
a firm, rep. by its partner
A.Selvam Anthony Raj.

2.A.Selvam Anthony Raj ... Respondent/
3.A.Bastin Yesudass Accused.

Criminal Appeal against the judgment dated 16.10.1997 made in
C.C. No.115 of 1996 on the file of Judicial Magistrate No.3, Salem.

!For appellant : Mr. B.Sriramulyu,
Senior Advocate,
for M/s.N.A.Ravindran and
V.Murugesan.

^For respondents: Mr. K.M.Manimaran,
for RR.1 and 2
Mr.P.Jegadeesan, for R.3

:J U D G M E N T

Complainant has come forward with this appeal against the order of acquittal, acquitting the Respondents / Accused 1 to 3 under Sec.138 Negotiable Instruments Act in C.C.No.115 of 1996 on the file of Judicial Magistrate No.3, Salem by the Judgment dated 16.10.1997.

2. The relevant facts could briefly be stated thus:- A.1 - M/s. Hope Knitting Home is a partnership firm, which had business transaction with the Complainant on credit. A.2 and A.3 are the partners of A.1 firm. In the course of business dealings, A.2 and A.3 representing as partners of A.1 firm, issued a cheque No.C3/94, 421769 dated 05.09.1995 drawn on Lakshmi Vilas Bank Limited, Tirupur for a sum of Rs.1,75,750/- under Ex.P.2 in favour of the Complainant for the amount due on credit purchase. The Complainant presented

Ex.P.2 - cheque for collection for the second time in his bank viz., Bank of Baroda. The Cheque - Ex.P.2 was returned with Ex.P.3 - Memo dated 22.12.1995 with an endorsement " Insufficient Funds " in the Account of the Accused. On 28.12.1995, the Complainant's Bank intimated the Complainant regarding the dishonour of the Cheque under Ex.P.4 - Memo.

3. The Complainant issued Ex.P.5 - Statutory Notice to the Accused on 30.12.1995. A.1 and A.2 refused to receive the notice and the same was returned as "Intimated Unclaimed". Exs.P.6 and P.7 are the returned Postal Covers. A.3 was served with notice and Ex.P.8 is the acknowledgement dated 01.01.1996. The Accused did not pay the Cheque amount even after 15 days. Hence, the Complaint was filed on 15.02.1 996 under Sec.138 Negotiable Instruments Act.

4. To substantiate the averments in the complaint, in the Trial Court, Complainant was examined as P.W.1 and Bank Officials were examined as P.W.2 (Rajan) and P.W.3 (Sundararajan). No evidence was adduced onbehalf of the Accused. The Accused raised the defence that there was no proper service of notice. They have also raised the point that the complaint was not filed within the stipulated time i.e. on or before 14.02.1996, but filed on 15.02.1996, which is barred by limitation.

5. Upon consideration of the evidence adduced and the contentions urged, the Trial Court acquitted the Respondents / Accused 1 to 3 interalia on the following findings:-

(i) Notice sent to A.1 and A.2 was returned under Exs.P.6 and P.7 as " Intimated Unclaimed " and that there was no proper service of notice upon A.1 and A.2;

(ii) That notice sent to A.3 was served upon one Mohan, who had received the same onbehalf of one Nirmal Textiles Process and that there is no link evidence as to how the said Mohan is connected to Bastin Yesudass - A.3 and hence, there is no proper service of notice upon A.3;

(iii)That the Complaint filed on 15.02.1996 is not filed within the stipulated time.

6. Aggrieved over the same, the Complainant has come forward with this appeal. Assailing the findings and conclusions of the Trial Court, the learned Senior counsel Mr.B.Sriramulu contended that the findings of the Trial Court faulting the Complainant in not taking further steps in issuing the second notice is erroneous. Placing reliance upon the case of K.Bhaskaran v. Sankaran Vaidhyan Balan (A.I.R. 1999 Supreme Court 3762), it is contended that mere sending of notice to the address of the Accused is sufficient to raise the presumption of " Deemed service of Notice " or otherwise the Respondents / Accused 1 to 3 might adopt the strategy by successfully avoiding

the receipt of the notice.

7. Contention of Respondents 1 and 2/A.1 and A.2. Supporting the findings of the Trial Court, the learned counsel for the Respondents 1 and 2 / A.1 and A.2 submitted that there was no proper service of notice as contemplated and when the notice was returned under Exs.P.6 and P.7 covers as " Intimated Unclaimed ", there cannot be presumption of proper service of notice in demanding the amount. It is further submitted that the complaint ought to have been filed on or before 14 .02.1996 and that the complaint filed on 15.02.1996 is beyond the stipulated time and is barred under Ss.138 and 142 Negotiable Instruments Act.

8. Contention of Respondent No.3 / A.3. The learned counsel for 3 rd respondent / A.3 submitted that the Complaint proceeds on the averment as if A.3 himself personally received the notice; while so one Mohan representing Nirmal Textiles had received Ex.P.5 - Notice. It is submitted that there are no averments connecting A.3 with the said Mohan of Nirmal Textiles and in that premise, the Trial Court had rightly acquitted the Accused and the reasonings for acquittal do not suffer from any infirmity warranting interference.

9. Upon careful reassessment of the evidence and materials on record, impugned Judgment and contentions of the Complainant and the Accused, the following points arise for consideration in this appeal:-

(i) Whether there is proper service of notice upon Respondents / Accused 1 to 3 ? whether under Sec.138 (b) Negotiable Instruments Act, can the Complainant invoke the presumption of " Deemed Notice " ?

(ii) Whether the finding of the Trial Court that the complaint filed is not in accordance with the provisions of the Negotiable Instruments Act suffers from serious or substantial error warranting interference ?

10. Sub Clause (b) of the proviso to Section 138 of Negotiable Instruments Act only requires notice to be given in writing by the payee to the drawer in which there should be a demand made by the payee. This clause does not prescribe any form or format for such notice. All that is required is the communication in writing by the Complainant to the drawer asking the drawer to pay the amount involved in the Cheque, which is dishonoured.

11. Ex.P.5 - notice was sent to Respondents / A.1 to A.3. The notices sent to A.1 and A.2 were returned as " Intimated Unclaimed ". Exs.P.6 and P.7 are the returned covers. The object of issuing notice indicating the factum of dishonour of cheque is to give an opportunity to the drawer to make payment within 15 days, so that it will not be necessary for the payee to proceed against in any criminal action, even though the bank dishonoured the cheque.

12. Issuance of notice is a condition precedent. But if the Accused purposefully evades to receive the same, the Complainant cannot be faulted. Relying upon A.I.R. 1999 Supreme Court 3762, the learned Senior Counsel submitted that " mere giving of notice " is sufficient compliance of Sec.138

(b) Negotiable Instruments Act and that service is not of relevance. It is further contended that if service is to be insisted upon, the Respondents / Accused might adopt a strategy by successfully evading the service of the notice. In the above decision, the Supreme Court has held thus:-

" The conditions pertaining to the notice to be given to the drawer have been formulated and incorporated in clauses (b) and (c) of the proviso to Section 138(1) of the Act. According to the said provisions on the part of the payee he has to make a demand by "giving a notice" in writing. If that were the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such "giving", the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days "of the receipt" of the said notice. It is, therefore, clear that "giving notice" in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer in the correct address."

13. In the instant case, Ex.P.5 - Notice was sent by registered post and was returned unserved with endorsement " Intimated Unclaimed ". Ex.P.5 - Notice was sent to the address " M/s. Hope Knitting, a Firm by its Partner A.Selvam Anthonyraj, No.38, Kannagi Nagar, Shanthi Kalyana Mandapam, P.N.Road, Tiruppur-2;

A.Selvam Anthonyraj, Partner
M/s.Hope Knitting, No.38,
Kannagi Nagar, Shanthi Kalyana Mandapam,
P.N.Road, Tiruppur-2"

said to be the address of Accused, where they are carrying on their business. Therefore, it is contended that A.1 and A.2 conveniently evaded to receive the same and that the Court is to raise the presumption of " Deemed Notice ". It is the further contention that when A.1 and A.2 have evaded the service of notice, Complainant cannot be faulted for the same and therefore, the statutory obligation imposed upon the Complainant under Sec.138 Negotiable Instruments Act is fully discharged.

14. Of course, Ex.P.5 - Notice sent to A.1 and A.2 to their place of business as stated above was returned unserved. Merely because the notice was despatched by Post to the correct address written on it, now can it be presumed that the notice was duly served upon A.1 and A.2 ? If notice as contemplated under Sec.138 Negotiable Instruments Act has been despatched by

Post to the correc t address / place of business, can it be deemed to have been served upon the Accused / Sendee ? are the short points arising for our consideration.

15. In my view the return of postal cover as "Intimated Unclaimed" by

itself would not amount to constructive notice when it is not averred by the Complainant in the complaint that the Accused is evading the service. Although, in appropriate cases, deemed service is to be accepted by the Court, such presumption of deemed service is not a matter of course in all cases. To raise the presumption of deemed notice, there should be clear averment in the complaint that the Appellant / Complainant had sent the statutory notice on demand intimating the dishonour of cheque and that the Respondents / Accused were evading the service. In the absence of such averment, no such presumption of deemed notice could be raised.

16. In 1993 MWN (D.C.) 127 (Susamma v. Rajendraw) it is held that there may be cases where notice is returned unclaimed on account of the deliberate evasion by the accused when the postman tendered the same. Where it is proved that, the notice was returned 'unclaimed' due to the evasion by the accused when tendered at the correct address that can be treated as service. The general burden to prove the prosecution case, since rests with the complainant, it is necessary for the complainant to prove the facts constituting the sending of notice and its receipt. The tender of the notice by the postal peon at the address of the accused has to be proved and if established that the same could not be actually served due to the culpable default or deliberate evasion of the accused, then it would constitute "receipt of notice". The burden to establish those facts rests with the complainant.

17. Thus the general burden is upon the Complainant to prove the facts constituting the sending of notice and that there is deliberate evasion of service of notice by the Accused. In the instant case, absolutely no averments are made either in the complaint or in the evidence of P.W.1 / Complainant herein that there was deliberate evasion of A.1 and A.2 to receive the notice. Considering the facts of the present case, it is not an appropriate case to raise the presumption of "Deemed Service" against A.1 and A.2.

18. Notice was sent to A.3 to the address A.Bastin Yesudass, Partner, Hope Knitting, Kallikkadu Thottam, S.F.No.914/2, K.V.R. Nagar, Karuvampalayam, Tirupur-4. But the same was not served upon A.3 - Bastin Yesudass and it was served upon one Mohan, who acknowledged the same for Nirmal Textiles Process on 01.01.1996. Either in the complaint or in the evidence of P.W.1, it is not made clear as to how the said Mohan is connected to A.3 - Bastin Yesudass. The complaint proceeds on the plain averments as if A.3 personally received the notice as is clear from the following: ... but the Accused No.3 has received the notice on 01.01.1996"... No connecting link evidence is adduced showing how the said Mohan is connected to A.3 - Bastin Yesudass or A.3 was evading service by setting up the said Mohan to receive the notice. In the absence of any averments connecting A.3 and the said Mohan, the trial Court was right in finding that there was no proper service of notice upon A.3 as partner of M/s. Hope Knitting, a firm.

19. Onbehalf of the Complainant, here again it is urged that notice was sent to A.3 and the same was served upon Mohan of Nirmal Textiles Process and that A.3 has clearly evaded the service and hence, that notice must have

been deemed to have been served upon A.3. As said earlier, here again there is no averment in the complaint that A.3 was evading the service by setting forth Mohan to receive the notice. In the absence of any such averments in the complaint, no presumption of " Deemed Service " could be raised against A.3.

20. Section 27 of General Clauses Act deals with the presumption of service of notice sent by post and provides that service of such notice shall be deemed to have been effected unless the contrary is proved. This principle is equally applicable to the service of notice for purpose of Section 138 of Negotiable Instruments Act. Section 138 does not prescribe any mode for giving of demand notice by the payee or holder of the cheque. The presumption could be raised only when the Complainant initially avers and proves that there is evasion of service. The premise of raising the presumption would arise only when the Complainant initially proves evasion of service. Thus the presumption of "Deemed Service " is permissible to be drawn only when the facts of a particular case so warrant.

21. The learned Senior Counsel for the Complainant contended that Respondents / A.1 to A.3 have not gone into the box in support of their contention that there was no proper service of notice. It is further contended that when the Respondents / A.1 to A.3 have not explained their stand, it must be deemed that the statutory obligation imposed upon the Complainant in sending the notice under Sec.138 Negotiable Instruments Act is fully discharged. This contention does not merit acceptance. Obligation is cast upon the Accused to explain their stand only when the Complainant avers and initially discharges the burden in proving that there was evasion of service by the Accused. In the complaint, one is to search in vain whether there was any such evasion of notice by the Accused. No averments are made in the complaint against A.1 to A.3 that they are evading service of notice, nor in the evidence of P.W.1 such allegations are spoken to. Considering the facts and circumstances, this case does not warrant such presumption of " Deemed Service " under the provisions of Sec.27 of General Clauses Act and Sec.114 of Illustration (f) of Indian Evidence Act.

22. The learned counsel for the 3rd respondent / 3rd Accused has drawn the attention of the Court to the decision in the case of R.M. Sundaram v. C.M.Ramraj (1993 (3) Crimes 175), where this Court held " Cheque returned unpaid due to insufficiency of funds - written demand notice returned with postal endorsement "not found" - Sction 138 does not contemplate constructive notice - Provision of sub-section (c) of section 138 of the Act cannot be said to have been complied with - Complaint is liable to be dismissed." This view is also held in the case of Rajiv Kumar v. State of U.P. (1993 Company Cases (78) page No.507), where in has been held that in the absence of proof of service of the notice of demand as required under section 138 of the Act, the prosecution of the drawer was not permissible".

23. Ex.P.5 - Notice was received by the said Mohan under Ex.P.8 - Acknowledgement on 01.01.1996. After certain calculations, the Trial Court found that the complaint ought to have been filed on 14.02.1996 . But the complaint was filed only on 15.02.1996. Thus the Trial Court found that the

complaint filed on 15.02.1996 was not within the stipulated time. This finding of the Trial Court of course is not correct. Under Sec.142 of Negotiable Instruments Act, the complaint is to be filed within one month on which day the cause of action has arisen under clause (c) of the proviso to Sec.138 Negotiable Instruments Act. Ex.P.8 - Acknowledgement is dated 01.01.1996. 15 days as contemplated under Sec.138(c) of Negotiable Instruments Act expires on 15.02.1996. Cause of action has arisen on the succeeding day, i.e. on 16 .01.1996. The complaint filed on 15.01.1996 is clearly within 30 days as contemplated. For the sake of clarity that the complaint is filed in time, it may be demonstrated by referring to the relevant dates as under:-

Date of receipt of Notice }
by A.3 } 01.01.1996

Time for payment as contem- }
plated under Sec.138(c) } 15 days.

15.01.1996

Cause of action arises }
immediately on the }
following day, expiry of }
15 days. Therefore cause }
of action arises on } 16.01.1996

Add 30 days } 30

15.02.1996

Complaint filed on } 15.02.1996.

Thus the complaint filed on 15.02.1996 is well within time. While so, the learned Magistrate erred in finding that the complaint was not filed in time.

24. Submitting that the complaint is filed on the basis of the second presentation and return and the complaint is not maintainable on such second presentation and dishonour, the learned counsel appearing for A.1 and A.2 relied upon the case of S.Jayantilal Shah v. State of Gujarat (1998 Company Cases page No.348). He further submitted that the complaint filed on the second presentation and dishonour for the second time is not maintainable and that no complaint could be lodged for the second dishonour under Sec.138 Negotiable Instruments Act. Where the holder fails to take action against the

Accused when the cheque was dishonoured at a first occasion, he is not entitled to lodge the prosecution on the dishonour of the cheque on the second presentation. This Court does not propose to go into this aspect in detail, since the point was not urged before the Trial Court either during trial or in the written arguments submitted onbehalf of A.1 and A.2. It may not be appropriate to consider the merits of this contention in this appeal against acquittal when that point was not raised before the trial Court.

25. The reasonings of the learned Magistrate that the complaint was not filed in time cannot be the ground for reversing the order of the acquittal since the parties have gone through the proceedings of trial as if the complaint was validly taken on file and adduced evidence. 26. The finding of the trial Court that there was no proper service of notice upon the Appellants / Accused 1 to 3 does not suffer from any perversity. The acquittal cannot be termed as unreasonable or against the weight of evidence and circumstances. The reasonings and findings of the Trial Court do not suffer from any erroneous approach or substantial error warranting interference. This appeal has no merits and is bound to fail.

27. For the reasons stated above, this appeal is dismissed.

Index:Yes
Internet:Yes
sbi
To
1. The Judicial Magistrate No.3, Salem.

2. The Judicial Magistrate No.3,
Salem, through

3. The Chief Judicial Magistrate,
Salem.